STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE DIANNE JUDD,

Plaintiff-Appellant,

v

DANIEL ESCHMAN,

Defendant-Appellee.

UNPUBLISHED
July 1, 2004

No. 246603
Oakland Circuit Court
LC No. 2002-038851-NO

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a newspaper delivery person, sustained injuries when she slipped on ice in defendant's driveway as she alighted from her vehicle to leave a newspaper on defendant's porch. She filed suit alleging that defendant negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that the condition was open and obvious.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects make even an open and obvious condition unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp, Inc* 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree. Plaintiff's reliance on *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119; 492 NW2d 761 (1992), is misplaced. In that case, the plaintiff was injured when he fell from a recessed loading dock in a dark warehouse. The plaintiff had been in the warehouse on previous occasions and knew that it was dark, but did not know of the existence of the loading dock prior to the incident. The *Knight* Court affirmed judgment for the plaintiff, reasoning that the relevant defect was not the darkness, but the existence of a loading dock of which the plaintiff was not previously aware. *Id*. at 127. Here, the fact that plaintiff claimed she did not see the ice prior to the incident is irrelevant. *Novotney*, *supra* at 477. Plaintiff admitted that she was not paying attention to the driveway as she drove onto it, but that she clearly saw the ice as she backed out of the driveway. It is reasonable to conclude that plaintiff would have observed the ice had she been paying attention to the driveway as she drove onto it. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff did not come forward with sufficient evidence to create a genuine issue of material fact as to whether an average person with ordinary intelligence would have discovered the condition upon casual inspection prior to the incident.

Plaintiff's argument that even if the condition of the driveway was open and obvious it still presented an unreasonable risk of harm due to the darkness is without merit. The darkness was not a special aspect of the driveway itself. *Lugo, supra*. Had plaintiff observed the driveway as she drove onto it, which was possible under the circumstances, any risk of harm would have been obviated. *Spagnuolo v Rudds No 2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997).

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray